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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ERNEST HAGEN, Defendant and Appellant.	G055280 (Super. Ct. No. 15CF1594) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance P. Jensen, Judge. Affirmed as modified.

Jason L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant William Ernest Hagen of one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and one count of criminal threats (§ 422, subd. (a)). The jury also found true a deadly weapon enhancement as to the criminal threats count. (§ 12022, subd. (b)(1).)

For purposes of sentencing, the court dismissed defendant's two prior strike convictions. The court sentenced defendant to an aggregate state prison term of eight years as follows: (1) the middle term of three years for the assault with a deadly weapon count; (2) a concurrent term of two years for the criminal threats count, plus one year for the personal use of a deadly weapon enhancement; and (3) a mandatory consecutive five-year sentence for a prior serious felony conviction. Pursuant to section 2933.1, the court also awarded defendant 109 actual days of presentence custody credits and 16 days of conduct credits.

Defendant raises two issues on appeal. First, he contends the verdict on the criminal threats count is not supported by substantial evidence. We disagree and affirm the judgment. Second, he claims the court erred in calculating his presentence conduct credits using the 15 percent limitation imposed by section 2933.1. We agree and modify the judgment to reflect the correct number of days of presentence conduct credits.

FACTS

In April 2015, defendant purchased a cart at a yard sale. He believed he would receive the cart after Jason, a homeless person, was done using it. A few days later, defendant was at a bar, and his friend told him Jason had the cart outside the bar. Defendant left the bar and approached Jason. Defendant claimed to own the cart, and

[1] All statutory references are to the Penal Code.

Jason asked how defendant knew the cart was his. There is conflicting evidence about what happened next.

According to the People's evidence, defendant told Jason not to question him. Defendant then shoved or punched Jason. Jason was able to push defendant away, and defendant retreated toward the bar. After the incident, Jason spoke to Trevor Cullen, a police officer, and indicated defendant said something to the effect of, "Don't mess with my friends," as he retreated.

According to defendant's testimony, he tried to prove the cart belonged to him by identifying a large rust stain. While he was pointing out the rust stain, Jason hit him on the cheek, and defendant fell down. After defendant stood up, Jason hit him again in the throat with a crutch. Jason then swung the crutch around, and defendant walked away.

After this first encounter, defendant returned to the bar and retrieved a box cutter knife from his car. He also put on a black sleeveless jacket to intimidate Jason and approached him a second time. Once again, there is conflicting evidence about what happened next.

According to the People's evidence, Jason told Officer Cullen that defendant "said something about cutting [Jason's] neck" as he approached the second time. Defendant also swung the box cutter knife and lifted it above his head as if he was going to throw it. To defend himself, Jason struck defendant with a crutch, and Jason told Officer Cullen that defendant said something to the effect of, "My friends are going to come back and kick your ass." Defendant then left the scene.

According to defendant's testimony, Jason swung the crutch as defendant approached a second time and struck defendant in the arm. Defendant held the box cutter knife in his fist and swung his fist at Jason. At some point during the altercation, defendant opened the blade of the box cutter knife. Defendant eventually decided the cart was not worth risking injury and ended the fight. As he walked away, he said, "You

know what? Forget it. You can keep the cart." Defendant then hid the box cutter knife in ice plants outside the bar.

Within five to 10 minutes after the incident, Jason spoke with Officer Cullen and explained what had happened. Officer Cullen and other police officers also spoke to defendant outside of his home.

At trial, Jason could not remember any of the threats defendant made during the altercation. However, Officer Cullen testified he spoke to Jason soon after the incident and Jason told him about defendant's three threats. Officer Cullen also testified Jason "was crying uncontrollably and . . . was very emotional." Jason similarly testified he was concerned for his safety and the safety of his dog and friends when defendant approached the second time. He further testified he thought he was in danger given defendant's "demeanor" and "the way he was moving."

DISCUSSION

Substantial Evidence Supports Defendant's Conviction for Making Criminal Threats

Defendant contends his conviction for making criminal threats should be reversed because there is insufficient evidence his threats were the proximate cause of Jason's fear rather than the physical assault. We disagree.

Section 422 provides, "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or

for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . [Citations.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

At the outset, we note the parties disagree on what standard applies to evaluate causation under section 422. Defendant analyzes causation under both the "but for" and the "substantial factor" tests, as if they are two unrelated concepts. They are not. The word "cause" has a "commonly understood meaning in both criminal and civil law." (*In re Ethan C.* (2012) 54 Cal.4th 610, 639.) "'If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries.'" (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052.) *In re Ethan C.* explained the symbiotic relationship between the "but for" test and the "substantial factor" test thusly: "One's wrongful acts or omissions are a legal cause of injury if they were a substantial factor in bringing it about. [Citations.] If the actor's wrongful conduct operated concurrently with other contemporaneous forces to produce the harm, it is a substantial factor, and thus a legal cause, if the injury, or its full extent, would not have occurred but for that conduct. Conversely, if the injury would have occurred even if the actor had not

acted wrongfully, his or her conduct generally cannot be deemed a substantial factor in the harm. [Citations.] This 'but for' limitation does not apply, however, if the actor's wrongful conduct alone would have produced the harm, even without contribution by other forces." (*In re Ethan C.*, at p. 640.)

Defendant's principal contention is that the "but for" limitation of the "substantial factor" test applies because the physical assault would have caused Jason to suffer fear in the absence of an oral threat. Thus, the threat cannot be said to be a cause of Jason's fear. Focusing on the "substantial factor" test without the "but for" limitation, defendant contends that "no jury could rationally infer that [defendant's] statements were a substantial factor in causing Jason's fear."

The People, for their part, argue the "*effect* of verbal threats are [*sic*] properly analyzed in the context of contemporaneous circumstances" (italics added), thereby allowing the jury to analyze the combined effect of the words and the physical assault. The People have the better of the argument. Section 422 requires that the threat be evaluated in context of the circumstances. A person who willfully threatens to commit a crime which, "*under the circumstances in which it is made*, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety" has committed a criminal threat. (§ 422, subd. (a), italics added.) Thus, in *People v. Solis* (2001) 90 Cal.App.4th 1002, the court found the trial court had "properly informed the jury that the threatening statement does not have to be the sole cause of the victim's fear . . . ." (*Id.* at p. 1014.) "The point is that all of the circumstances can and should be considered in determining whether a terrorist threat has been made." (*Ibid.*)

Here, the jury reasonably could conclude defendant's threats were a substantial factor in causing Jason's fear. Substantial evidence showed Jason was fearful after the incident and specifically told Officer Cullen about defendant's three separate threats. According to Officer Cullen, Jason "was crying uncontrollably and . . . was very emotional." Jason also testified he was concerned for his safety as well as the safety of his dog and friends. He further testified he used a crutch in self-defense after defendant approached him with a box cutter knife and threatened to cut his neck. Given the entirety of the circumstances, it was not necessary for Jason to explicitly testify the threats increased his fear. (*People v. Solis*, *supra*, 90 Cal.App.4th at p. 1014 [court "properly informed the jury that the threatening statement does not have to be the sole cause of the victim's fear and that a statement the victim does not initially consider a threat can later be seen that way based upon a subsequent action taken by a defendant"].)

Viewed in the light most favorable to the judgment, the evidence supports a finding that Jason was fearful in part because of defendant's threats, even if a contrary finding also might have been reasonable. And there is no basis to second guess the jury by suggesting Jason would have suffered the same fear in the absence of the threats. Contrary to defendant's assertion, Jason's inability to recall the threats two years after the incident, or his testimony that he was afraid because of defendant's conduct, does not change our conclusion.

The Court Incorrectly Calculated Presentence Conduct Credits

Defendant and the People agree the court erred in limiting defendant's presentence conduct credits to 15 percent under section 2933.1 because defendant was not convicted of a violent felony as defined in section 667.5, subdivision (c). We agree.

Section 2933.1, subdivision (a) provides, "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933."

Defendant's convictions are not violent felonies within the meaning of section 667.5, subdivision (c) so section 2933.1 does not apply. The court should have calculated defendant's credits under section 4019. (§ 4019 [allowing conduct credits for work and good behavior while in custody prior to sentencing].)

Despite the court's error, the People rely on section 1237.1 and claim defendant forfeited his right to argue this issue on appeal because he "failed to raise the issue at sentencing or to subsequently file a motion for correction of the record." Defendant argues there is no forfeiture because this is not the sole issue on appeal and he is appealing questions of law rather than clerical miscalculations.

Section 1237.1 provides: "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." However, section 1237.1 applies to mathematical errors, not legal error as to how credits should be calculated. (*People v. Delgado* (2012) 210 Cal.App.4th 761, 765; *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139.) Here, the court's legal error in applying section 2933.1 is cognizable on appeal.

Because defendant is entitled to presentence conduct credits pursuant to section 4019, the appropriate remedy is for us to modify the judgment to reflect the correct number of days for which defendant is entitled to presentence conduct credit. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270.) The parties do not dispute the award of 109 actual days. Thus, the judgment is modified to reflect an award of 109 actual days, plus 109 days for conduct credit, for a total of 218 days of presentence custody credit.

DISPOSITION

The judgment is modified to reflect an award of 218 days of presentence custody credit. As modified, the judgment is affirmed in all other respects. On remand, the clerk of the superior court is directed to prepare an amended abstract of judgment stating the correct award of presentence custody credit and forward a certified copy to the Department of Corrections and Rehabilitation.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.